Supreme Court, U.S.
FILED

(1) 94 873 NOV 1 5 1994

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

WILLIAM E. FOSTER,

Petitioner,

v.

FREEMAN UNITED COAL MINING COMPANY,

Respondent,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Party-In-Interest.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

20 C.F.R. 727.203(b)(2) provides that the interim presumption of disability due to pneumoconiosis is rebutted if the employer establishes that "the individual is able to do his usual coal mine work or comparable and gainful employment (see section 410.412(a)(1) of this title)." The question presented is whether section 727.203(b)(2)'s cross reference to section 410.412(a)(1) is for purposes of defining comparable and gainful work or whether it was intended to work a wholesale adoption of that section's causation requirements for disability due to pneumoconiosis.

RULE 29.1 STATEMENT

Freeman United Coal Mining Company is a wholly owned subsidiary of Freeman Energy Corporation which, in turn, is a wholly owned subsidiary of General Dynamics.

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PETITION FOR WRIT OF CERTIORARI

William E. Foster respectfully petitions for issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals in *Freeman United Coal Mining Company v. OWCP*, is reported at 30 F.2d

834. App. *infra*, A-1. The decisions of Benefits Review Board ("BRB") dated March 23, 1989 and June 29, 1993 are not reported. App. *infra*, C-1, D-1. The decisions of the Administrative Law Judge ("ALJ") dated April 30, 1987 and May 14, 1990 are not reported. App. *infra*, E-1, F-1.

STATEMENT OF JURISDICTION

The court of appeals entered its judgement on July 19, 1994. William Foster filed a timely Petition for Rehearing which was denied by the court on August 22, 1994. This case concerns a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* The jurisdiction of this court is invoked under 28 U.S.C. 1254(1). The court of appeals had jurisdiction to review a final order of the BRB under 33 U.S.C. section 921(c), which is made applicable to claims under the Black Lung Benefits Act by virtue of 30 U.S.C. 932(a).

RELEVANT REGULATIONS

1. 20 C.F.R. 727.203(b):

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this sub-part, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work. (see sec. 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful employment (see sec. 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

2. 20 C.F.R. 410.412(a)(1)

"Total disability defined."

(a) A miner shall be considered totally disabled due to pneumoconiosis if:

(1) His pneumoconiosis prevents him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or with some regularity and over a substantial period of time (that is, "comparable and gainful work". . . .)

STATEMENT OF THE CASE

In this case, William Foster filed his claim under Part C of the Black Lung Benefits Act, 30 U.S.C. sec. 901 *et seq.* in 1977. After certain procedural events not relevant to the disposition of this case, the ALJ denied the claim. The ALJ invoked the interim presumption under section 727.203(a)(1) based on the x-ray evidence; he also concluded that the employer had rebutted the presumption under section 727.203(b)(2) based on Dr. Lefrak's opinion that claimant suffered from no pulmonary disability. App. *infra*, E-5.

Claimant appealed, and the BRB reversed and remanded. The BRB stated that under *Wetherill v. Director, OWCP*, 812 F.2d 376 (7th Cir. 1987) rebuttal under section (b)(2) can only be accomplished by showing the miner is not disabled for any reason; it is not satisfied by showing that the inability to work is not due to pulmonary problems. The BRB further observed that the issue of causation is addressed by subsection (b)(3). The case was remanded so that the ALJ could consider the evidence in light of *Wetherill*. App. *infra*, C-3.

On remand the ALJ allowed the parties to augment the record with more recent medical evidence. In addition to the previous reports of Doctors Fine and LeFrak, the reports and depositions of Doctors William Houser and Jeffrey Selby were submitted along with the report of Dr. Edward Campell. The ALJ concluded that Claimant was totally disabled, relying on the conclusions of Dr. Houser and Dr. Campell. He therefore found that there could be no rebuttal under *Wetherill's* interpretation of subsection (b)(2). Rebuttal under subsection (b)(3) was also rejected, since the ALJ found that claimant's respiratory disease was a contributing cause to his total disability. App. *infra*, F-4 to F-7.

The BRB affirmed the ALJ's decision, (App. *infra*, D-1), and the employer appealed to the United States Court of Appeals for the Seventh Circuit. The appellate court reversed, repudiating its previous position in *Wetherill*.[1] In justifying its conclusion that the inability to work be due

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[1] The seventh circuit reinforced the position in took in *Wetherill* in the cases of *Peabody Coal Company v. Shonk*, 906 F.2d 264, 269 (7th Cir. 1990), *Freeman United Coal Mining Company v. BRB*, 912 F.2d 164, 171 (7th Cir. 1990) and *Freeman United Coal Mining Company v. OWCP*, 20 F.3d 289, 296-297 (7th Cir. 1994).

to pneumoconiosis, the court relied on section 727.203(b)(2)'s cross reference to section 410.412(a)(1). The cross-reference immediately follows the phrase "comparable and gainful work," which is defined in section 410.412(a)(1). The court found that the cross-reference was intended to encompass section 410.412(a)(1)'s causation requirement that the inability to work be due to pneumoconiosis. In sum, the court rejected the contention that the cross-reference was for the simple purpose of defining comparable and gainful work; it determined that the cross-reference accomplished a wholesale adoption of section 410.412(a)(1)'s requirement of a causal link between pneumoconiosis and the inability to work. App. *infra*, A-7 to A-10. The court admitted that its interpretation was at odds with what other appellate courts have found evident from the plain language of the regulation. App. *infra*, A-7. The court, however, reasoned that the purpose of the BLBA would be undermined if a person whose total disability was not caused by his pneumoconiosis could obtain benefits under the Act. App. *infra*, A-7 to A-10. In doing so the court ignored the fact that section 727.203(b)(3) addresses causation. Subsection (b)(3) provides that the employer may rebut the presumption of total disability due to pneumoconiosis by showing that the disability did not arise "in whole or in part out of coal mine employment." The court did discuss subsection (b)(3) in conjunction with a hypothetical claimant with non-disabling pneumoconiosis whose inability to work is due to losing his leg in a mining accident. The court reasoned that subsection (b)(3) would not allow for rebuttal in that case, since the miner's leg was lost while coal mining. This hypothetical claimant was used to justify the need to read causation requirements into section (b)(2). App. *infra*, A-1 to A-4.

William Foster filed a Petition for Rehearing and a Suggestion for Rehearing *en banc*, contending that the court's interpretation of subsection (b)(2) was illogical and pre-

vented the cross-reference in that subsection from being construed consistently with other regulatory cross-references to section 410.412(a)(1). William Foster also argued that the court's decision rendered subsection (b)(3) superfluous and conflicted with the decisions of the other circuits which had addressed the issue. The Petition for Rehearing was denied without comment. App. *infra*, B-1.

REASONS FOR GRANTING THE WRIT

I.

THE REFERENCE TO SECTION 410.412 IN SECTION 727.203(b)(2) IS ONLY FOR PURPOSES OF DEFINING COMPARABLE AND GAINFUL WORK; ANY OTHER INTERPRETATION IGNORES THE REASON FOR OTHER SIMILAR CROSS-REFERENCES AND RESULTS IN AN INCONSISTENT AND ILLOGICAL INTERPRETATION OF THE REGULATIONS.

By engrafting the definition of total and permanent disability found in section 410.412(a) into the rebuttal provision of section 727.203(b)(2), the appellate court has ignored the fact that similar cross-references found in the same regulation are for the limited purpose of defining comparable and gainful work. As a result, the cross-references to section 410.412 will have different meanings within the same regulation. Subsection (b)(1) states that rebuttal shall be accomplished if an individual is in fact doing his usual coal mine work or comparable and gainful work, followed by a reference to section 410.412(a)(1). 20 C.F.R. 727.203(b)(1). The obvious purpose for this cross-reference is to define comparable and gainful work; there is no reason to also integrate section 410.412's causation requirements. Likewise, section 727.205(b) states that no miner is totally disabled if he is doing his customary coal

mine work or comparable and gainful work, with another reference to section 410.412(a)(1). 20 C.F.R. 727.205(b). Again, the obvious reason for that cross-reference is to define comparable and gainful work. It seems more than coincidental that the reference to section 410.412(a) in section 727.203(b)(2) also immediately follows the terms "comparable and gainful work." Yet the court of appeals has found that the cross-reference was intended to work a wholesale adoption of that section. This interpretation thwarts the goal of construing the cross-references in the regulations in a consistent and harmonious manner. *McCuin v. Secretary of Health & Human Services*, 817 F.2d 161, 168 (1st Cir. 1987); *Sun City Community Hospital v. United States*, 624 F.2d 997, 1003 (Ct. Cl. 1980). Regulations are to viewed as a whole, and one phrase should not be isolated and given its own meaning. *Campesinos Unidos v. United States Department of Labor*, 803 F.2d 1063, 1069 (9th Cir. 1986). Further, identical terms within the same regulatory or statutory scheme should be given the same meaning. *Commissioner of Internal Revenue v. Keystone Consolidated Industries, Inc.*, 508 U.S. ____, 124 L.Ed. 2d 71, 80 (1993); *St. Laurent v. Ambrose*, 991 F.2d 672, 680 (11th Cir. 1993).

Moreover, it would have been simple for the drafters of the section (b)(2) to integrate the causation requirement of section 410.412. The very existence of section 410.412 indicates that the regulators can speak with clarity when they intend that the miner's inability to work be due to pneumoconiosis. See also, 20 C.F.R. 718.204(b)(1), (2). Nevertheless, the court of appeals decided that the reference to section 410.412 was a better means to accomplish this purpose, even though the words "comparable and gainful work," are terms which require the clarification provided by section 410.412(a)(1). This construction violates the basic premise that regulations are judged by what is

actually stated, and not by unexpressed intentions. *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1324 (3d Cir. 1987), quoting *Bethlehem Steel v. OSHA*, 573 F.2d 157, 161 (3d Cir. 1978); *L.R. Wilson & Sons, Inc. v. Donovan*, 685 F.2d 664, 675 (D.C. Cir. 1982); *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113, 1119 (10th Cir. 1977). It also runs afoul of the policy that doubts regarding interpretation are to be resolved in the miner's favor. *Mangus v. Director, OWCP*, 882 F.2d 1527, 1530 (10th Cir. 1989).

Limiting the cross-reference to a definition of comparable and gainful work also finds support in section 727.4(b). This section explicitly states that the criteria for determining total disability found in the part 718 regulations "shall not be applicable to the determination of claims under this part unless applicability is provided by part 718 or this part." 20 C.F.R. 727.4(b). Section 718.204(b)(2) utilizes the same definition of total disability found in Section 410.412. The appellate court's decision clearly circumvents the intent expressed in section 727.4(b).

While the appellate court defended its position as reflecting the part that sections 727.203(b)(2) and 410.412 play in the "larger structure," (App. *infra*, A-8), it ignored the fact that the Act as a whole is clearly designed to promote the liberal distribution of benefits. *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042 (6th Cir. 1993); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986). There is no doubt that the presumption and rebuttal provisions do not always reflect medical reality, but it is not the appellate court's job to find a way around the resulting liberal benefits based on its own philosophical disagreement. As this court observed, the regulatory scheme of presumptions is a result of both fact and policy. *Mullins Coal Co. v. Director, O.W.C.P*, 484 U.S. 135, 157 (1987). The policy favoring liberal benefits is evidenced

in several ways. For example, simple pneumoconiosis does not cause the same results as the complex form of the disease, and is often not disabling. Nevertheless, there is a presumption of total disability based upon only x-ray evidence. 20 C.F.R. 727.203(a)(1). Indeed, "it is a basic premise of the Act that simple pneumoconiosis can in fact cause disability." *Kaiser Steel Corp. v. Director, OWCP*, 748 F.2d 1426, 1430 (10th Cir. 1984). Anthracosis may be no more than a pigmentation change in the lung which causes no impairment, but it is considered to be pneumoconiosis. 20 C.F.R. 727.202; *Peabody Coal Co. v. Shonk*, 906 F.2d 264, 267-268 (7th Cir. 1990). Likewise, pneumoconiosis may not "in and of itself" disable the miner; nevertheless, benefits are still appropriate despite the semantical difficulty in equating that situation to total disability due to pneumoconiosis. See, *Compton v. Inland Steel Coal*, 933 F.2d 477, 480 (7th Cir. 1991); *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 1263-1265 (11th Cir. 1990); *Robinson v. Picklands Mather & Co./ Leslie Coal Co.*, 914 F.2d 35, 37-38 (4th Cir. 1990); *Adams v. Director, OWCP*, 886 F.2d 818, 820-825 (6th Cir. 1989); *Bonessa v. United States Steel Corp.*, 884 F.2d 726, 732-734 (3d Cir. 1989) (rejecting the "in and of itself" standard). It has been stated medical opinions contesting the clinical accuracy of the regulations should be discounted as contrary to the basic premise of the Act. *Thorn v. Itmann Coal Company*, 3 F.3d 713, 719 (4th Cir. 1993); *Robbins v. Jim Walter Resources, Inc.*, 898 F.2d 1478, 1483 (11th Cir. 1990); *Kaiser Steel Corporation v. Director, OWCP*, 757 F.2d 1078, 1083 (10th Cir. 1985); *Kaiser Steel v. Director, OWCP*, 748 F.2d 1426, 1430 (10th Cir. 1984); see also, *Wetherill v. Director, OWCP*, 812 F.2d 376, 382 (7th Cir. 1985). The appellate court's opinion in this case amounts to a legal rejection of the clinical accuracy of the regulations and is no more acceptable.

Nevertheless, the appellate court insisted that acceptance of William Foster's interpretation of section (b)(2) would "collapse" the Congressional distinction between simple and complex pneumoconiosis. App. *infra*, A-8. However, the presumption available for complex pneumoconiosis is irrebuttable. 30 U.S.C. 921(b)(3). The distinction the appellate court sought to preserve has been handled by legislation and regulation. The appellate court's desire for a more stringent test of benefits for simple pneumoconiosis cannot be implemented by judicial legislation: "It is the function of the . . . Court to implement [the] legislative will, not to second guess its wisdom." *Kaiser Steel Corp. v. Director, OWCP*, 748 F.2d 1426, 1431 (10th Cir. 1984).

II.

SECTION 727.203(b)(3) IS RENDERED SUPERFLUOUS BY THE APPELLATE COURT'S INTERPRETATION.

Section 727.203(b)(3) addresses the concerns expressed by the court that a miner whose employment causes no impairment should not be allowed compensation. That section provides for rebuttal if the employer can show that the miner's total disability did not arise in whole or in part from his coal mine employment. No benefits would be awarded in the case of a claimant whose mining employment has no impact on his disability. Such a result reflects a balancing of the legislative purpose that compensation be made for both the economic and health losses suffered by the miner. See, *Usury v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 21 (1976). The appellate court's concern for the one legged coal miner with non-disabling pneumoconiosis is misdirected; there was no such claimant in this case. Section (b)(3) addresses causation, and it therefore makes no sense to import a heightened causa-

tion requirement into section (b)(2) based upon the unlikely hypothetical claimant not present here. The phantom issue created by (b)(3)'s theoretical application to the one-legged coal miner is simply in the nature of dicta in this case. Even if it was appropriate to address the rare dilemma of the one-legged coal miner, the appellate court could have avoided the strained interpretation of subsection (b)(2) by simply restricting recovery under section (b)(3) in such cases. It would have been more reasonable to construe (b)(3) to limit the disability arising from coal mining employment to the subject matter of the Act, i.e. that related to pneumoconiosis.[2] Nevertheless, the appellate court seemed bent on pursing its own agenda of limiting awards by restricting benefits under section (b)(2) in a manner which also rendered section (b)(3) impotent. The appellate court's approach simply makes section (b)(3) "duplicative," and effectively reads it out of the Act. *Martin v. Alabama By-Products Corp.*, 864 F.2d 1555, 1557 (11th Cir. 1989). Once again the principles of regulatory construction are undermined.[3]

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[2] For example, the court could have viewed section (b)(3)'s "in whole or in part" language as reflecting the "uncertain state of medical knowledge concerning the exact consequences of prolonged exposure to coal dust." *Bethlehem Mines v. Massey*, 736 F.2d 120, 124 (4th Cir. 1984). That subsection has been viewed as reflecting the problems of proof arising where a multitude of physical and environmental factors combine to produce a totally disabling pulmonary impairment. *Id.*

[3] This court has indicated that sections (b)(1) and (2) deal only with the existence of total disability, that section (b)(3) deals with causation and section (b)(4) with disease. In *Mullins Coal Co. v. Director, O.W.C.P.*, 484 U.S. 135, 141 (1987), the court discussed rebuttal, stating that the presumption of disability is rebutted, "If the evidence establishes that the claimant is doing or is capable of doing his usual or comparable work, that his disability did not arise, even in part, out of coal mine employment, or that he does

(Footnote continued on following page)

Although the appellate court may favor a stricter connection between disease and disability, it may not rewrite the regulatory scheme to achieve a result it believed is fairer to the coal companies. It must be remembered that Congress also became dissatisfied with the ease with which claims were being granted under the part 727 regulations. For that reason it enacted the reforms found in the Black Lung Benefits Amendments of 1981 which eliminated three of the five presumptions for claims filed after the Act's effective date. 30 U.S.C. 921(c); see generally, A. Larson, *Law of Workmen's Compensation*, section 49.91(d) (1991). Stricter regulatory changes also followed, as evidenced by the part 718 regulations. Of particular interest is section 718.204(b) which provides that a miner is considered totally disabled from coal mining "if pneumoconiosis . . . prevents or prevented the miner" from performing his usual coal mine work or from engaging in comparable and gainful employment, which is then defined. 20 C.F.R. 718.204(b)(1), (2). Again, it is evident that the limitation engrafted by the appellate court on section 727.203(b)(2) can be clearly expressed by regulation when such a result is desired. The part 727 regulations, however, still apply to this claim. 20 C.F.R. 718.1(b). In effect, the appellate court has applied the stricter standards

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[3] *continued*
not have pneumoconiosis. Thus, *in order to rebut the interim presumption the employer has the burden of proving that at least one of the three conditions of eligibility is not satisfied.*" *Mullins*, 484 U.S. at 143-144 (emphasis added). The court clearly lumped (b)(1) and (b)(2) together as relevant to the issue of total disability; (b)(4) was viewed as addressing disease, and (b)(3) dealt with causation. Although Claimant recognizes that the issue present here was not before the court in *Mullins*, its reading of the rebuttal provisions supports the plain interpretation advocated by William Foster. See also, *Cort v. Director, OWCP*, 996 F.2d 1549, 1552 (3d Cir. 1993).

of part 718 to rebuttal of the 727 claim. This amounts to judicial legislation which offends both the Act and the regulatory assignment of claims now in place.

Furthermore, Claimant wins in this case if the appellate court had not disturbed the previously accepted interpretation of section (b)(2). Rebuttal under section (b)(3) could not be accomplished, since claimant's coal mining was a "contributing cause" of his disability. See, *Freeman United Coal Mining Company v. Anderson*, 973 F.2d 514, 518 (7th Cir. 1992). The ALJ specifically found that claimant's respiratory disease, which was related to both coal dust and smoking, "causes some impairment which is a contributing factor to his total disability." App. *infra*, F-7. The court's new reading of section (b)(2) renders the contributing cause standard of (b)(3) ineffective and harkens back to the long rejected "in and of itself" standard. See, *Compton v. Inland Steel Coal*, 933 F.2d 477, 480 (7th Cir. 1991); *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 1263-1265 (11th Cir. 1990); *Robinson v. Picklands Mather & Co. / Leslie Coal Co.*, 914 F.2d 35, 37-38 (4th Cir. 1990); *Adams v. Director, OWCP*, 886 F.2d 818, 820-825 (6th Cir. 1989); *Bonessa v. United States Steel Corp.*, 884 F.2d 726, 732-734 (3d Cir. 1989).

III.

THE APPELLATE COURT'S INTERPRETATION OF SUBSECTION (b)(2) IS FUNDAMENTALLY AT ODDS WITH THE DECISIONS OF OTHER CIRCUITS.

The appellate court insufficiently explains why there "may well be . . . no conflict" with the decisions of the other circuits. App. *infra*, A-10. While the appellate court may obviously explain away its own precedent, it may not rewrite the decisions of other circuits. Each Circuit to address the issue has concluded that subsection (b)(2) rebut-

tal is limited to determining whether or not the miner was totally disabled for any reason.[4] There is no ambiguity whatsoever. In *York v. Benefits Review Board*, 819 F.2d 134 (6th Cir. 1987), the coal miner retired "due to a back injury." *York*, 819 F.2d at 135. None of the ventilatory or blood gas reports established total disability due to a respiratory disease, and like the present case, the miner established disability by way of x-rays. The issue was the propriety of "the ALJ's finding the miner was not totally disabled because he does not have a totally disabling respiratory impairment." *York*, 819 F.2d at 136-137. The court reversed, explaining that the claimant's total disability included his back and other health problems. It held that the ALJ's focus solely on respiratory impairment was error. *York*, 819 F.2d at 137-138. The appellate court's insinuation that *York's* was modified by *Neace v. Director, OWCP*, 867 F.2d 264 (6th Cir. 1989) finds no support in the text of that opinion. App. *infra*, A-10. In *Neace*, the problem was the lack of explicit findings that the claimant was able to do his usual coal mine work or comparable and gainful work. *Neace*, 867 F.2d at 267. *Neace* stated that "[i]n the present case, there was no substantial medical evidence of any other type of impairment other than a potential respiratory impairment," the existence of which was rejected by the ALJ. *Neace*, 867 F.2d 264, 268. The ALJ's rejection of the respiratory impairment under those circumstances was tantamount to finding the claimant was able to do his usual coal mine work. *Neace*, 867 F.2d 264, 269. *Neace* simply did not modify *York*.

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[4] The tenth circuit has applied the seventh circuit's new standard for section (b)(2), but it explained that its use of (b)(2) was for purposes of that case only, since all parties agreed on that section's interpretation. See, *Mitchelson v. Director, O.W.C.P.*, 880 F.2d 265 (10th Cir. 1989).

Nor are the "other cases in this vein" sufficiently explained away by the fact that some other pulmonary disability was the "real" cause of disability. App. *infra*, A-10. In *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 490 n.7 (6th Cir. 1985), the court concluded that rebuttal under section (b)(2) was inappropriate because the miner was totally disabled due to a heart condition unrelated to his employment. In *Robbins v. Jim Walter Resources, Inc.*, 898 F.2d 1478, 1482-3 (11th Cir. 1990), the court noted that it was irrelevant whether the claimant's heart disease or respiratory problems were the cause of his total disability when considering rebuttal under section (b)(2). See also, *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 162, n.5 (3d Cir. 1986). In *Martin v. Alabama By-Products Corp.*, 864 F.2d 1555, 1557-1558 (11th Cir. 1989), the court remanded because the ALJ erroneously concluded that rebuttal could be accomplished if the inability to work was unrelated to pneumoconiosis. The claimant in that case had suffered a stroke and had been treated for severe advanced arteriosclerosis and depression among other things. *Martin*, 864 F.2d at 1556. Although *Sykes v. Director, OWCP*, 812 F.2d 890, 894 (4th Cir. 1987) may have involved mainly respiratory impairments, the court's interpretation of section (b)(2) is deliberately broad: "Section 727.203(b)(2) is concerned with the question of whether miners are totally disabled *for whatever reason.* There is no inquiry into causation in a proper section 727.203(b)(2) rebuttal." *Sykes v. Director, OWCP*, 812 F.2d 890, 893 (4th Cir. 1987) (emphasis in original). The conflict exists, and the seventh circuit court of appeals stands alone in its interpretation of subsection (b)(2).

The fallout from this conflict will be far reaching. The Director, the BRB and the ALJ's will have to apply the rebuttal provisions differently depending on which circuit

the miner worked in. Moreover, where coal miners work in more than one circuit, the result on appeal can be determined by the losing party, since black lung appeals lie in any circuit where the miner worked. See, *Consolidation Coal Co. v. Chubb*, 741 F.2d 968 (7th Cir. 1984). Take the case of the miner who has worked in both the seventh circuit and sixth circuit; if he is denied benefits by the agency under the seventh circuit standard, he could successfully appeal to the sixth circuit. Where benefits are granted by the agency under the standards established by the sixth circuit, the coal company could prevail on appeal to the seventh circuit. Neither result is a satisfactory resolution for all parties.

CONCLUSION

For the reasons stated above, William E. Foster, respectfully requests that the petition for writ of *certiorari* be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 93-2923

FREEMAN UNITED COAL MINING CO.,

Petitioner,

v.

WILLIAM E. FOSTER, *et al.*,

Respondents.

Petition for Review of an Order of the
Benefits Review Board, Department of Labor.

ARGUED APRIL 26, 1994—DECIDED JULY 18, 1994

Before POSNER, *Chief Judge*, and ESCHBACH and EASTERBROOK, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Is a coal miner, afflicted by non-disabling pneumoconiosis and disabled by an unrelated condition, "totally disabled due to pneumoconiosis" within the meaning of 30 U.S.C. §§ 902(f)(1)(A) and 921? If the answer is yes, then William E. Foster receives black lung benefits—and so does a miner who loses a leg when a coal car rolls over it.

To see how a person disabled by an amputation can collect black lung benefits, it is necessary to work through a chain of definitions and regulations. Congress told the Secretary of Labor to ensure that persons totally disabled by pneumoconiosis receive benefits. 30 U.S.C. §921(a). The

definition of "total disability" in 30 U.S.C. §902(f) remits us to the Secretary's regulations, but it also requires the regulations to include some presumptions. And there are statutory presumptions as well: any miner suffering from complicated pneumoconiosis is irrebuttably presumed to be totally disabled by that disease. 30 U.S.C. §921(c)(3); see also *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 22-24 (1976).

The Secretary's definition of "total disability" provides that

> (a) A miner shall be considered totally disabled due to pneumoconiosis if:
>
> (1) His pneumoconiosis prevents him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time (that is, "comparable and gainful work"; see §§410.424 through 410.426); and
>
> (2) His impairment can be expected to result in death, or has lasted or can be expected to last for a continuous period of not less than 12 months.

20 C.F.R. §410.412. But few miners attempt to prove disability directly. Most rely on presumptions. Foster made his claim for benefits in 1977, so the controlling regulations are those of the "interim presumption" in 20 C.F.R. §727.203:

> (a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:
>
> (1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see §410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in §410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table: * * *

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table: * * *

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

* * *

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see §410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see §410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

Now let us apply these regulations to the one-legged miner.

Our hypothetical miner has simple pneumoconiosis, which does not prevent him from doing his regular job.

An x-ray reading permits this miner to activate the interim presumption under §727.203(a)(1) even though the ventilatory and blood gas studies to which §§727.203(a)(2) and (3) refer do not produce "qualifying" values (that is, do not show functional impairment). The mine operator turns to §727.203(b), which lists means of rebuttal. Section 727.203(b)(4) is inapplicable, and in any event it may not be used if the miner activates the presumption under §727.203(a)(1). *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 150 (1987). Section 727.203(b)(1) allows rebuttal if the miner is doing his usual work, but our miner is not working. He is unable to work, which renders §727.203(b)(2) irrelevant. That leaves §727.203(b)(3), which permits rebuttal if the disability did not arise "in whole or in part out of coal mine employment". But our miner's leg was lost in an accident at work. The handicap arose out of coal mine employment, and §727.203(b)(3) falls away.

Dissatisfaction with this outcome, which uses a disability unrelated to pneumoconiosis to support an award of black lung benefits, led the Benefits Review Board to turn back to §727.203(b)(2), which it treated as authorizing rebuttal when the miner is disabled but the disability has no connection to pneumoconiosis. *Sykes v. Amon Coal Co.*, 2 BRL 1-1089 (1980). In *Wetherill v. Director, OWCP*, 812 F.2d 376 (7th Cir. 1987), a panel of this court threw cold water on that approach, remarking:

> The Board apparently interpreted paragraph (b)(2) to allow rebuttal if the admitted inability to work is caused by a disease other than pneumoconiosis. This interpretation of paragraph (b)(2) seems contrary to its plain language and therefore erroneous. We have previously noted that this interpretation of paragraph (b)(2) was problematic but did not need to resolve the issue because the Board also correctly relied on paragraph (b)(4) in that case. We reiterate that paragraph (b)(2) is probably an improper provision with which to rebut the presumption in a case such as this. Once again, however, there is no need to resolve that ques-

> tion because rebuttal has been accomplished here under paragraph (b)(3).

812 F.2d at 379-80 (citations omitted). Today we cannot escape decision.

Foster, born in 1918, worked in underground coal mines for 26 years, until 1975. In 1972 he suffered a back injury on the job. Three operations left him unable to perform his old work as a driller. Between 1972 and 1975 he worked intermittently at different jobs underground, but finally he gave up. Since 1975 he has been unemployed. An administrative law judge denied Foster's application under the Black Lung Benefits Act. The ALJ concluded that an x-ray taken in September 1986 entitled Foster to the benefit of the §727.203(a)(1) presumption. Two B-readers interpreted the film as positive for pneumoconiosis; two read it as negative; the ALJ gave Foster the benefit of the draw. (This finding, apparently depending on the "true doubt" rule, is precarious in light of *Director, OWCP v. Greenwich Collieries*, 62 U.S.L.W. 4543 (U.S. June 20, 1994), but the mine operator does not contest the matter.) The ALJ deemed the presumption rebutted under §727.203(b)(2). It is undisputed that Foster quit because of a back injury. Although Foster testified that he had trouble breathing, the ALJ credited the assessment of Stephen S. LeFrak, Co-Director of Pulmonary Disease and Respiratory Care at the Washington University School of Medicine in St. Louis, that Foster did not have any pulmonary disability. According to Dr. LeFrak, ventilatory and blood gas studies showed normal pulmonary function.

Shortly before the ALJ issued his decision, we handed down the opinion in *Wetherill*. The Benefits Review Board reversed on the basis of *Wetherill*, instructing the ALJ to reconsider under §727.203(b)(3). The BRB deemed itself bound by our opinion but added: "We note our disagreement with the Court's holding in Wetherill as it precludes rebuttal under subsection (b)(2) where no respiratory or pulmonary disability has been shown. Such interpretation

conflicts with the intent of Congress to provide benefits under this Act for disability due to *pneumoconiosis*, not other disabling conditions." (Emphasis in original.)

On remand, the ALJ disagreed with the BRB's understanding of *Wetherill*. The passage in our opinion addressing §727.203(b)(2) was dictum, the ALJ believed, and therefore not binding on the BRB. But the ALJ believed that the instructions remanding the case were binding on him, so he turned to §727.203(b)(3). That subsection is transparently inapplicable, because Foster's disability arose out of his coal mine employment—he suffered the back injury while performing his duties in the mine. The ALJ added that evidence developed after the remand shows that Foster now has other problems: chronic bronchitis and emphysema, pulmonary impediments that the ALJ found are "related both to coal dust exposure and cigarette smoking." These problems are not themselves disabling, but they show that the state of Foster's health is related to his employment. Cf. *Pauley v. BethEnergy Mines, Inc.*, 111 S. Ct. 2524 (1991) (discussing subsection (b)(3)). As for §727.203(b)(2), the ALJ observed that Foster could not "do his usual coal mine work or comparable and gainful work," making this method of rebuttal unavailable. This time the BRB affirmed, remarking that, under *Wetherill*, "[i]f total disability is established, subsection (b)(2) rebuttal is precluded".

All of this yields the conclusion that a miner who has simple pneumoconiosis, which would not interfere with his job in the slightest, receives black lung benefits if something else prevents him from working. Once a positive x-ray reading triggers the interim presumption, a finding that the miner is not disabled by pneumoconiosis has no role whatever to play. Yet, as the BRB said in its first decision in this case, the Black Lung Benefits Act is not an all-encompassing disability program. Back injuries on the job are supposed to be handled by workers' compensation programs under state law, or by health and welfare benefit programs under collective bargaining agreements and ERISA. The Black Lung Benefits Act treats complex

pneumoconiosis as a special case, bestowing benefits even if the miner still can work (or is disabled by an unrelated condition). The outcome of this case suggests, however, that the irrebuttable presumption arising out of complex pneumoconiosis does not function much differently from the interim presumption arising out of a single positive x-ray reading.

According to the BRB, *Wetherill* is to blame. The BRB believes that when a miner has pneumoconiosis and is disabled, but not by the pneumoconiosis, rebuttal should be allowed under §727.203(b)(2). As the ALJ pointed out, the panel in *Wetherill* explicitly did *not* decide this question. Having found rebuttal under (b)(3), it did not need (and did not purport) to come to rest on the interpretation of (b)(2). But the analysis of *Wetherill* cannot be ignored. The panel believed that the plain language of part (b)(2) precludes the Board's reading. Other courts of appeals have announced the same conclusion. *Sykes v. Director, OWCP*, 812 F.2d 890, 893-94 (4th Cir. 1987); *York v. BRB*, 819 F.2d 134, 137 (6th Cir. 1987); *Robbins v. Jim Walter Resources, Inc.*, 898 F.2d 1478, 1483 (11th Cir. 1990). We do not believe that the language is at all "plain," however.

Part (b)(2) permits rebuttal of the interim presumption if "[i]n light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see §410.412(a)(1) of this title)". The language looks like a reference to disability pure and simple until we consider the cross-reference, which sends us to a regulation (already quoted) defining total disability caused *by pneumoconiosis*. One could reply, we suppose, that §410.412(a)(1) is just a definition of "total disability" that does not specify a causal link between the disability and the pneumoconiosis. If that is *really* what part (b)(2) and the cross-reference are doing, however, then the outcome is so at odds with the statute that it would be hard to sustain. The alternative is to understand §727.203(b) as a whole as reflecting an understanding that the goal, in the language of the statute, is to identify and compensate "total disability due to pneumoconiosis" while

remitting to other statutes (or to private insurance) disability attributable to other causes. Anything else collapses simple and complex pneumoconiosis, which Congress carefully distinguished. Understanding the context of part (b)(2) and §410.412(a), and the part they play in a larger structure, is vital.

> Statutes have meanings, sometimes even "plain" ones, but these do not spring directly from the page. Words are arbitrary signs, having meaning only to the extent writers and readers share an understanding. A mark such as ↑ has a meaning without language, but "up" must be decoded according to rules and cultural norms. Language in general, and legislation in particular, is a social enterprise to which both speakers and listeners contribute, drawing on background understandings and the structure and circumstances of the utterance. Slicing a statute into phrases while ignoring their contexts—the surrounding words, the setting of the enactment, the function a phrase serves in the statutory structure—is a formula for disaster.

Herrmann v. Cencom Cable Associates, Inc., 978 F.2d 978, 982 (7th Cir. 1992). Regulation 410.412(a) *begins* "A miner shall be considered totally disabled due to pneumoconiosis if . . .", and subsection (a)(1) continues "[h]is pneumoconiosis prevents him from. . . ." See also 30 U.S.C. §901(a) ("[T]he purpose of this subchapter [is] to provide benefits . . . to coal miners who are totally disabled due to pneumoconiosis"). One cannot understand the criteria in §410.412(a)(1) as if they had nothing to do with a causal link between the pneumoconiosis and the disability.

Whether persons who have pneumoconiosis and are disabled, but not *by* the pneumoconiosis, should get black lung benefits, is easier to answer than is the question whether persons who have multiple disabilities are entitled to benefits. Recently we held that a miner disabled by a stroke does not qualify for benefits, even if he also suffers from pneumoconiosis that would have precluded him

from working in the absence of the stroke. *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994). We have also said that when a pulmonary disability has multiple causes—for example, coal dust and cigarette smoke—the miner does not collect black lung benefits if he would have been unable to work even had he never been exposed to coal dust. *Shelton v. Director, OWCP*, 899 F.2d 690, 693 (7th Cir. 1990). When coal dust contributes to a disabling pulmonary disability, the miner receives black lung benefits; but if cigarette smokers' emphysema would have precluded work even if the person had never been in a mine, black lung benefits should not be awarded whether or not the miner has simple pneumoconiosis. These joint-cause and multiple-cause cases have been perplexing. How does one handle counterfactual inquiries? Physicians may not know what would have happened had coal dust not been a factor. Cases such as *Hawkins v. Director, OWCP*, 907 F.2d 697, 704 n.11 (7th Cir. 1990); *Peabody Coal Co. v. Director, OWCP*, 778 F.2d 358 (7th Cir. 1985); and *Old Ben Coal Co. v. Prewitt*, 755 F.2d 588 (7th Cir. 1985), accordingly hold that if a miner's pneumoconiosis alone is disabling, the fact that the miner has some additional and potentially disabling condition does not preclude an award of black lung benefits. But the case of a miner who could work despite his pneumoconiosis, and who is disabled by a condition unrelated to coal dust, is easier than any of these joint-cause and multiple-cause cases. We do not have to answer counterfactual questions, for we *know* that Foster worked normally until he injured his back, and the ALJ found that his pneumoconiosis did not disable him as of the date of the hearing. Putting §727.203(b) aside, it is linguistically impossible to say that such a person is totally disabled by pneumoconiosis, and nothing in the text or structure of the statute suggests that Congress has directed mine operators to pay benefits in such cases. A regulation *seeming* to have that effect need not be understood mechanically, when the mechanical reading implies invalidity. The better way to read subsection (b)(2) is as the BRB initially read it: to say that the

cross-reference invites us to consider not only the miner's ability to do his old job but also whether inability to work is traceable to coal dust.

Cases in this circuit since *Wetherill* have repeated its observations but like *Wetherill* itself have stopped short of turning those remarks into a holding. E.g., *Peabody Coal Co. v. Shonk*, 906 F.2d 264, 269 (7th Cir. 1990) ("the proper inquiry . . . *seems to be* whether *any* impairment prevented a miner from doing his usual job") (first emphasis added); *Freeman United Coal Mining Co. v. BRB*, 912 F.2d 164, 171 n.5 (7th Cir. 1990) (*Wolfe*) ("In *Wetherhill* [sic], this court deferred determination of the requisite standards for establishing Subsection (b)(2) rebuttal. 812 F.2d at 379-80. The issue has not since been resolved."). We conclude that the dictum in *Wetherill* should not become a holding, and that the ALJ was right the first time in allowing rebuttal under part (b)(2).

Given the opinions from the fourth, sixth, and eleventh circuits cited above, our decision seems to create a conflict among the circuits. But it may well be that there is no conflict—that the opinions in the other circuits are no more definitive than was *Wetherill* itself. For example, although in *York v. BRB* the sixth circuit announced that part (b)(2) does not allow the employer to rebut the presumption by showing that the miner's disability has a cause other than pneumoconiosis, in *Neace v. Director, OWCP*, 867 F.2d 264, 269 (6th Cir. 1989), the same court added a vital qualification: things might be otherwise if the disabling condition were not a *respiratory* impairment. Other cases in this vein (including our own opinion in *Wolfe*, which cited *York* and *Sykes* with apparent approval) involve claims that some other pulmonary condition—for example, emphysema—was the "real" source of the miner's disability. As we emphasized above, dual-cause or multiple-cause cases are much more difficult than the one we consider. Post-*Wetherill* cases in our own court, including *Wolfe* and *Freeman United Coal Mining Co. v. OWCP*, 20 F.3d 289, 296-97 (7th Cir. 1994) (*Forsythe*), contain passages based on the language in *Wetherill*. When

several panels explicitly reserve an issue, later decisions reciting language from the earlier opinions, but not adding any analysis, cannot be said to close the book on the question. We believe that a disabling condition *unrelated* to pulmonary problems may overcome the interim presumption, and we doubt that other circuits would disagree. Although it quoted from *Sykes*, the panel in *Wolfe* also wrote that "[a]n award of benefits under the Act means that the claimant has shown that he is (1) totally disabled (2) due to pneumoconiosis (3) caused by his coal mining employment." 912 F.2d at 167-68. We do not think that the judges who participated in *Wolfe* and *Forsythe*, or our colleagues in other circuits, really believe that §727.203(b) has written requirement (2) out of the Act.†

The ALJ's first opinion was rendered on the assumption that §727.203(b)(2) permitted the employer to show that the miner's disability was unrelated to pneumoconiosis. Substantial evidence supports the decision to deny the miner's request. Foster worked until his back injury. The medical records submitted at the first hearing led the ALJ to find that Foster had no pulmonary impairment of any kind. Additional medical records submitted after remand led to the conclusion that Foster suffers from chronic bronchitis and emphysema, but the ALJ did not find that these conditions would be disabling independent of the back injury. Foster suffered a back injury and is entitled to workers' compensation plus any other medical benefits his employer contractually agreed to supply. He is not disabled by pneumoconiosis and is not entitled to benefits under the Black Lung Benefits Act. We grant the petition for review and set aside the Board's order.

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† Notwithstanding this observation, we have circulated this opinion to all active judges before release under Circuit Rule 40(f). A majority did not favor a hearing en banc. Judges Cudahy and Ripple voted to hear the case en banc.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 22, 1994

Before

Hon. RICHARD A. POSNER, Chief Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

FREEMAN UNITED COAL MINING CO., *Petitioner,*

No. 93-2923 v.

WILLIAM E. FOSTER, *et al.*, *Respondents.*

Petition for Review of an Order of the
Benefits Review Board, Department of Labor.

ORDER

Respondent, William E. Foster, filed a petition for rehearing and suggestion of rehearing en banc on July 29, 1994. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX C

U.S. Department of Labor [Not-Published]

Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

BRB No. 87-1347 BLA
OWCP No. 353-03-1518

WILLIAM E. FOSTER	)	
	)	
Claimant-Petitioner	)	
v.	)	FILED AS PART
	)	OF THE RECORD
	)	
FREEMAN UNITED COAL MINING COMPANY	)	
	)	
	)	March 23, 1989
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION
	)	and ORDER
	)	
	)	
Party-in-Interest	)	

Appeal of the Decision and Order of Nicodemo DeGregorio, Administrative Law Judge, United States Department of Labor.

Harold B. Culley, Jr., Raleigh, Illinois, for claimant.

Robert W. Lewis, Benton, Illinois, for employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and G. LAWRENCE, Administrative Law Judge.*

Claimant appeals the Decision and Order (81-BLA-1522) of Administrative Law Judge Nicodemo DeGregorio denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge found that although claimant had established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), rebuttal was established pursuant to 20 C.F.R. §727.203(b)(2).[1] Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge applied the wrong standard in finding rebuttal at subsection (b)(2). Employer responds that the decision of the administrative law judge should be affirmed. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a).

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. IV 1986).

[1] The administrative law judge's finding of invocation under 20 C.F.R. §727.203(a)(1) is unchallenged on appeal. This finding is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge found that employer may rebut the interim presumption under subsection (b)(2) by establishing that claimant does not have a totally disabling respiratory or pulmonary impairment. Decision & Order at 3. As claimant correctly contends, the United States Court of Appeals for the Seventh Circuit, under whose appellate jurisdiction this case arises, held in *Wetherill v. Director, OWCP*, 812 F.2d 376 (7th Cir. 1987), that in order to establish rebuttal pursuant to subsection (b)(2), it must be shown that the miner is not disabled "for whatever reason", not just for pulmonary or respiratory reasons.[2] The issue of causation of claimant's disability is properly addressed under subsection (b)(3). Therefore, on remand, the administrative law judge should reconsider the evidence under subsections (b)(2) and (b)(3) in light of *Wetherill*.[3]

At the hearing, the administrative law judge granted employer 60 days to arrange for a medical examination and to submit a report. By letter dated November 24, 1986, employer requested that the record be left open for an additional indefinite period for the submission of Dr. Campbell's report. By letter of March 6, 1987, employer submitted a report by Dr. Campbell. Objections were filed

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[2] We note our disagreement with the Court's holding in *Wetherill* as it precludes rebuttal under subsection (b)(2) where no respiratory or pulmonary disability has been shown. Such interpretation conflicts with the intent of Congress to provide benefits under this Act for disability due to *pneumoconiosis*, not other disabling conditions.

[3] We note that rebuttal under subsection (b)(4) is precluded because a finding of invocation under subsection (a)(1) precludes a finding of rebuttal under subsection (b)(4). *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 108 S.Ct. 427, 435 n.26, 11 BLR 2-1, 2-9 n. 26 (1987).

by claimant and the administrative law judge ruled that the submission was untimely. We reject employer's request at this time to order the administrative law judge to accept Dr. Campbell's report into evidence. The administrative law judge has broad discretion in resolving procedural matters, and may properly refuse to admit into evidence medical opinions submitted post hearing and beyond a specified time limit. *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356, 1-359 (1985). On remand, this is a matter that again falls within the discretion of the administrative law judge.

If, on remand, the administrative law judge finds no entitlement under Part 727, he must then consider the applicability of 20 C.F.R. §410.490. *Pittston Coal Group v. Sebben*, 109 S.Ct. 414 (1988), and 20 C.F.R. Part 718, *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 1-45 (7th Cir. 1987), to this claim.

Accordingly, the Decision and Order of the administrative law judge is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

/s/ James F. Brown
Administrative Appeals Judge

I concur:

/s/ Glenn Robert Lawrence
Administrative Law Judge

McGRANERY, Administrative Appeals Judge, concurring in part and dissenting in part.

I agree with the majority's determination that this case must be remanded to the administrative law judge for reconsideration of the evidence at 20 C.F.R. §727.203(b)(2) and (b)(3) in light of *Wetherill v. Director, OWCP*, 812 F.2d 376 (7th Cir. 1987), and, if entitlement is not found under 20 C.F.R. Part 727, consideration of the applicability of 20 C.F.R. §410.490, *Pittston Coal Group v. Sebben*, 109 S.Ct. 414 (1988), and 20 C.F.R. Part 718, *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 1-45 (7th Cir. 1987).

I must part company with my colleagues, however, on the issue of employer's post-hearing evidence. I believe that employer's November 24, 1986 letter constituted a motion to keep the record open for submission of Dr. Campbell's report, a motion upon which the administrative law judge never ruled. Absent this letter, I would agree with the majority that employer's submission of the report was indeed untimely. Since the record does not reflect, however, that the administrative law judge considered this motion to extend the time for filing the medical report, I think he should rule on the motion and the Board should not simply assume that employer's request was denied.

Dated this 23rd day of March 1989

/s/ Regina C. McGranery
Administrative Appeals Judge

SERVICE SHEET

[Omitted in printing.]

APPENDIX D

U.S. Department of Labor [Not-Published]

Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

BRB No. 90-1577 BLA
OWCP No. 353-03-1581

WILLIAM E. FOSTER	)	
	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
	)	JUNE 29, 1993
	)	
FREEMAN UNITED COAL MINING COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION AND ORDER
	)	
Party-in-Interest	)	

Appeal of the Decision and Order on Remand of Nicodemo DeGregorio, Administrative Law Judge, United States Department of Labor.

Harold B. Culley, Jr., Raleigh, Illinois, for claimant.

Louis D. Bernstein (Gould & Ratner), Chicago, Illinois, for employer.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (81-BLA-1522) of Administrative Law Judge Nicodemo De Gregorio awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case has been before the Board previously. The administrative law judge initially invoked the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and found that the presumption was rebutted pursuant to Section 727.203(b)(2). Accordingly, benefits were denied. Pursuant to claimant's appeal, the Board vacated the administrative law judge's denial of benefits and remanded the case for consideration of rebuttal at subsections (b)(2) and (b)(3) under the standard set forth by the United States Court of Appeals for the Seventh Circuit in *Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987) and instructed the administrative law judge that if he again found that entitlement was not established under Part 727, he must consider the evidence under 20 C.F.R. §410.490 and 20 C.F.R. Part 718. *See Foster v. Freeman United Coal Mining Company*, BRB No. 87-1347 BLA (March 23, 1989) (unpublished).[1] On remand, the administrative law judge found that as the evidence supported a finding that claimant is totally disabled and unable to perform his usual coal mine employment, the presumption was not rebutted pursuant to Section 727.203

[1] We note that the Board affirmed the administrative law judge's finding that the interim presumption was invoked pursuant to Section 727.203(a)(1). *See Foster v. Freeman United Coal Mining Company*, BRB No. 87-1347 BLA (March 23, 1989).

(b)(2). In addition, the administrative law judge found that the medical evidence was insufficient to rebut the interim presumption pursuant to subsection (b)(3). Accordingly, benefits were awarded. Employer appeals the award of benefits, contending that the administrative law judge erred in finding that the interim presumption was not rebutted at subsections (b)(2) and (3). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director) has not filed a brief in this appeal.

The Board's scope of review is defined by statute. We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Contrary to employer's initial contention, the administrative law judge applied the correct standard for Section 727.203(b)(2) rebuttal. Rebuttal pursuant to subsection (b)(2) may be established if the miner is found not totally disabled for any reason. *See Wetherill, supra.* If total disability is established, subsection (b)(2) rebuttal is precluded and the cause of the miner's disability must be addressed at subsection (b)(3). *Id.*; *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986). As the administrative law judge in the instant case considered the medical evidence and concluded that claimant was totally disabled and unable to perform his usual coal mine employment, we reject employer's contention and affirm the administrative law judge's finding that rebuttal was not established at Section 727.203(b)(2).

Employer further contends that the administrative law judge applied an incorrect standard for rebuttal at sub-

section (b)(3) when he found that the presumption was not rebutted because claimant's respiratory disease caused "some impairment which is a contributing factor of his total disability." Decision and Order on Remand at 5. Employer contends that it was only required to establish that pneumoconiosis was not a contributing cause of claimant's total disability. *See* Employer's Brief at 15. In finding that the presumption was not rebutted at subsection (b)(3), the administrative law judge initially accorded less weight to the opinions of Drs. Selby, Campbell and Lefrak as the physicians opined that claimant does not have pneumoconiosis and thus their opinions were "based on an erroneous premise."[2] Decision and Order on Remand at 4. This was permissible.[3] *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Further, the administrative law judge permissibly accorded greater weight to Dr. Fine's opinion of moderate impairment due to pneumoconiosis as he was claimant's treat-

[2] Drs. Lefrak and Selby opined that claimant does not have pneumoconiosis and Dr. Campbell opined there is no evidence of coal workers' pneumoconiosis and stated that while claimant is disabled, it is due to coronary artery disease and a back injury and not to a respiratory or pulmonary impairment. *See* Director's Exhibit 22; Employer's Exhibits 3, 4; Claimant's Exhibit 7; 20 C.F.R. §727.203(b)(3).

[3] We reject employer's contention that the administrative law judge failed to provide an explanation for his credibility findings in this Decision and Order regarding Drs. Lefrak and Fine, which contradict his previous findings in his original denial of this claim. As the administrative law judge admitted several additional medical reports into the record, and as instructed on remand reconsidered all of the medical evidence, it is reasonable that his evaluation of the new and previously considered evidence under new law resulted in a different result.

ing physician. *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge found that based on the opinions of Drs. Fine and Houser, claimant's respiratory disease caused some impairment which contributes to his disability and thus the interim presumption was not rebutted pursuant to subsection (b)(3).[4] Inasmuch as the administrative law judge acted within his discretion in according less weight to the only opinions supportive of rebuttal at subsection (b)(3), his finding that employer failed to meet its burden for establishing rebuttal is supported by substantial evidence and is therefore affirmed. *See* 20 C.F.R. §727.203(b)(3); *Wetherill, supra.*[5]

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[4] Dr. Houser diagnosed pneumoconiosis and chronic bronchitis, concluded that claimant was totally and permanently disabled and stated that claimant's lung disease would be a contributing factor in his overall disability. *See* Claimant's Exhibits 3, 6.

[5] Employer contends that claimant is precluded from establishing entitlement under 20 C.F.R. §410.490. Inasmuch as we affirm the administrative law judge's finding that entitlement was established pursuant to 20 C.F.R. Part 727, this case is no longer subject to adjudication under Section 410.490. *See Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524, 15 BLR 2-155 (1991); *Whiteman v. Boyle Land and Fuel Co.*, 15 BLR 1-11 (1991) (*en banc*).

Accordingly, the Decision and Order on Remand of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

/s/ James F. Brown
Administrative Appeals Judge

/s/ Nancy S. Dolder
Administrative Appeals Judge

/s/ Regina C. McGranery
Administrative Appeals Judge

CERTIFICATE OF SERVICE

[Omitted in printing.]

APPENDIX E

U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	)	
	)	
WILLIAM E. FOSTER	)	
	)	
Claimant	)	
v.	)	DATE ISSUED: APRIL 30, 1987
	)	
	)	
FREEMAN UNITED COAL MINING COMPANY	)	
	)	
	)	Case No.
Employer	)	81-BLA-1522
and	)	
	)	OWCP No.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS	)	353-03-1518
	)	
	)	
Party in Interest	)	

Harold B. Culley, Jr., Esquire
For the Claimant

Robert Wayne Lewis, Esquire
For the Employer

Before: NICODEMO DeGREGORIO
Administrative Law Judge

E-2

DECISION AND ORDER – REJECTION OF CLAIM

This case arises out of a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* (the Act). The claim was filed by William E. Foster (Claimant) on September 15, 1977. Freeman United Coal Mining Company (Employer) controverted the claim. The case was heard on October 28, 1986 in Carbondale, Illinois. Employer was allowed 30 days from the date of hearing for the submission of re-readings of certain chest x-rays; both parties were allowed 60 days for the submission of reports of medical examinations of Claimant, to be performed subsequent to the hearing, as well as for the filing of briefs. Tr. at 9, 11, 17, 60. By letter of November 24, 1986 Employer submitted x-ray interpretations by Dr. Joseph Rosenstein and Dr. William S. Cole, and a legible page of Director's Exhibit 22, already part of the record. The documents are received in evidence. By letter dated March 6, 1987 Employer submitted a report of physical examination of Claimant by Dr. Edward J. Campbell, together with reports of laboratory studies. By letter dated March 12, 1987 Claimant objected to Employer's submission as untimely. Since Claimant is clearly right, the objection is sustained, and Dr. Campbell's report is rejected. No briefs have been filed.

Findings of Fact and Conclusions of Law

Claimant was born in 1918 and completed the 8th grade in school. He has worked in coal mines about 26 years, always underground, in a variety of jobs. In 1972 he suffered a back injury on the job, which required three surgical operations. Prior to this accident, Claimant's job was coal drilling, although he also substituted on occasions as

shooter and machine operator. Claimant characterized this job as medium heavy. After the back injury, and the consequent operations, he tried three times to return to his regular job of driller, but was unable to do it. On a doctor's advice, Claimant was transferred to the position of beltman. Unfortunately, Claimant's back condition prevented him from performing even this job. Accordingly, Claimant had to quit the mine in October of 1985. Claimant testified, however, that he felt unable to continue his coal mine work also on account of a breathing difficulty which he had been experiencing since 1973.

In sum, I find that Claimant's usual coal mine work was that of coal driller, since his post-injury employment as beltman was intermittent and he was unable to perform its duties. I also find that Claimant quit his coal mine employment because of his back injury, although I also credit his testimony that he was experiencing some breathing difficulty.

Claimant has not been employed in any capacity since October 1975. From 1941 to 1976 he smoked approximately a pack of cigarettes a day; from 1976 to the date of the hearing he had cut his consumption rate to half-a-pack a day. Claimant has been under the care of Dr. Herbert Fine for years, and has been taking medication for blood pressure, gout, thyroid, and breathing problems.

II

Since Claimant has well in excess of 10 years of coal mine employment and filed his claim before April 1980, he is entitled to a presumption of total disability due to pneumoconiosis if he satisfies any one of the medical conditions specified at 20 CFR 727.203(a).

In the case at hand, there are two positive interpretations of a chest x-ray taken on March 6, 1978; two positive interpretations of an x-ray taken on September 15, 1986; and two negative re-readings of the latter x-ray. Dir. Exs. 17, 18; Cl. Exs. 1, 2; E. Exs. 1, 2. Also, there are B-readers on both side of the issue. I believe Claimant is entitled to the interim presumption under section 727.203(a)(1).

III

The record contains reports of medical evaluations by two physicians. Claimant was examined by Dr. Herbert V. Fine, his treating physician, on March 10, 1978. Based on history, clinical examination, a pulmonary function test, and a blood gas study, Dr. Fine reported chronic obstructive pulmonary disease "in the form of emphysema, presumed pneumoconiosis, based upon long term coal mining employment," and hypertensive cardiovascular disease. Dir. Ex. 16. Dr. Fine also reported that the pulmonary disease was related to Claimant's coal mine employment, and that the resulting impairment was "moderate, influenced by extended activities." *Ibid.*

On January 20, 1981 Claimant was examined on behalf of Employer by Dr. Stephen S. Lefrak, Co-Director of Pulmonary Disease and Respiratory Care Division and Associate Professor of Medicine, Washington University School of Medicine. Based on history, clinical examination, normal ventilatory function and normal gas exchange at rest and with exercise, and chest x-ray, Dr. Lefrak concluded that there was no evidence of any form of pneumoconiosis nor of any form of pulmonary disability. Dir. Ex. 22.

Employer may rebut the interim presumption under Section 727.203(b)(2), by establishing that Claimant does

not have a totally disabling respiratory or pulmonary impairment. *Lyons* v. *Amax Coal Co.*, 4 BLR 1-285 (1981). I am of the opinion that Employer has established rebuttal under this section, by means of Dr. Lefrak's report.

I believe Dr. Lefrak's report outweighs Dr. Fine's report for the following reasons. First, Dr. Fine's opinion of moderate pulmonary impairment was based on the results of a ventilatory study and a blood gas study which are the lowest and oldest of the record. Those studies were done in March 1978. Dir. Exs. 11, 15. The ventilatory study was reviewed by Dr. Roger S. Mitchell, Jr. who found the three FEV_1 values unacceptable because they were all different. Dir. Ex. 12. In fact, a repeat ventilatory study done on September 30, 1980 resulted in higher values for both FEV_1 and MVV. Dir. Exs. 13, 14. Finally, in February 1981 Dr. Lefrak obtained normal results in both a ventilatory study and in blood gas studies at rest and with exercise. Dir. Ex. 22. Given the improvement in Claimant's ventilatory and blood gas studies after March 1978, I am of the opinion that the values relied upon by Dr. Fine were not true indicators of any permanent pulmonary impairment. Hence, the medical opinion based on those values is not reliable. Second, Dr. Lefrak performed a blood gas study at rest as well as on exercise, while Dr. Fine's study was done only at rest. In determining capacity for work, I think an exercise study is more significant than a study at rest. And the normal exercise results obtained by Dr. Lefrak are uncontradicted. In sum, Dr. Lefrak's opinion of no pulmonary disability is more consistent with the reliable objective data. As for Claimant's testimony concerning his breathing difficulty on exertion, I note that this difficulty began in 1973 and did not prevent him from working. It was a back injury that ended his coal mining career.

By reason of the foregoing, I conclude that Employer has rebutted the presumption pursuant to section 727.203 (b)(2). This conclusion also precludes entitlement under 20 CFR Part 410. See *Capers* v. *The Youghiogheny and Ohio Coal Co.*, 6 BLR 1-1234 (1984).

ORDER

The claim of William E. Foster for benefits under the Act is denied.

/s/ Nicodemo DeGregorio
Administrative Law Judge

ND:kat

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. §725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision by filing a notice of appeal with the Benefits Review Board, Suite 757, 1111 20th Street, N.W., Washington, D.C. 20036.

SERVICE SHEET

[Omitted in printing.]

APPENDIX F

U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	)	
	)	
WILLIAM E. FOSTER,	)	
	)	
Claimant,	)	
v.	)	DATE ISSUED:
	)	MAY 14, 1990
	)	
FREEMAN UNITED COAL MINING COMPANY,	)	
	)	
	)	Case No.
Employer,	)	81-BLA-1522
and	)	
	)	OWCP No.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,	)	353-03-1518
	)	
Party-in-Interest.	)	

DECISION AND ORDER ON REMAND

I

By Decision and Order dated March 23, 1989, the Benfits Review Board remanded this case for reconsideration of the evidence under 20 CFR 727.203(b)(2) and (b)(3) in light of *Wetherill v. Director, OWCP*, 812 F.2d 376 (7th

Cir. 1987). The record of the case was received on June 6, 1989. Because medical reports of record relevant to the issue of causation of disability were based on examinations of Claimant performed in 1978 and 1981, by Order of July 7, 1989, the parties were requested to indicate whether they wished to augment the record with more recent medical evidence.

Claimant and Employer have both submitted additional medical evidence. By letter of October 19, 1989, Claimant submitted a medical report of Dr. William C. Houser, dated October 3, 1989. On October 20, 1989, Employer submitted a narrative report by Dr. Jeffrey W. Selby and x-ray interpretations of Drs. Selby, James R. Castle, Bruce N. Stewart, and Kirk E. Hippensteel, together with their relative curicula vitae. On November 6, 1989, Claimant submitted x-ray reports of Drs. T. R. Marshall and Stephen N. Fisher. On December 5, 1989, Employer submitted a medical report of Dr. Edward J. Campbell, dated February 27, 1987, together with his curriculum vitae. Claimant's objection to this report on grounds of untimeliness is overruled. On January 23, 1990, Claimant submitted a deposition of Dr. Houser, and on March 1, 1990, Claimant submitted a deposition of Dr. Selby. All submissions of both parties have been received in evidence.

On March 19, 1990, Claimant filed a Post-trial Memorandum. Employer has moved to strike statements from a medical article and a copy of an unpublished opinion of the Seventh Circuit Court of Appeals, which were attached to Claimant's memorandum. The motion is granted, and the material stricken. On April 6, 1990, Employer filed its Brief on Remand. Claimant objects to the consideration of the brief because it was not timely filed. The objection is overruled.

II

At the outset, I note that Employer goes outside the scope of the remand by arguing invocation of the interim presumption under §727.203(a)(1) and rebuttal under §727.203 (b)(4). The Board explicitly affirmed invocation of the presumption on the basis of x-ray evidence of pneumoconiosis, and has likewise precluded rebuttal under §727.203(b)(4). The purpose of the remand is to consider rebuttal under §727.203(b)(2) and (b)(3), and, if rebuttal is established, the applicability of 20 CFR 410.490.

III

I agree with Employer that the Board has misconstrued the impact of *Wetherill v. Director, OWCP*, 812 F.2d 376 (7th Cir. 1987) on the issue of subsection (b)(2) rebuttal. *Wetherill*, as amended on denial of rehearing on May 1, 1987, declined to decide the subsection (b)(2) question, and affirmed the Board under subsection (b)(3). On the other hand, I do not agree with Employer's attempt to reduce the court's discussion of subsection (b)(2) to the insignificance of incidental remarks.[1] At any rate, given the

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[1] "The Board apparently interpreted paragraph (b)(2) to allow rebuttal if the admitted inability to work is caused by a disease other than pneumoconiosis. (Petitioner's App. 38, 39a). This interpretation of paragraph (b)(2) seems contrary to its plain language and therefore erroneous. *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 162 n.5 (3d Cir. 1986); *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 486 n. 3 (6th Cir. 1985). We have previously noted that this interpretation of paragraph (b)(2) was problematic but did not need to resolve the issue because the Board also correctly relied on paragraph (b)(4) in that case. *Knudtson v. Benefits Review Board*, 782 F.2d 97, 100 (7th Cir. 1986). We reiterate that paragraph (b)(2) is probably an improper provision with which to rebut the presumption in a case such as this. Once again, however, there is no need to resolve that question because rebuttal has been accomplished here under paragraph (b)(3)."

Wetherill v. Director, OWCP, 812 F.2d at 379-380.

court's tentative interpretation of the regulation, which coincides with the interpretation adopted by the Third, Fourth, and Sixth Circuits,[2]) I take the proper rebuttal standard to be as set out in the Board's remand decision. In order to rebut under subsection (b)(2), Employer must establish that the miner is not disabled for whatever reason, i.e., he is able as a matter of fact to do his usual coal mine work.

III

I believe that Claimant is not able to do his usual coal mine work. As stated in my original decision of April 30, 1987, Claimant quit his job because he was unable to do it. Dr. Houser, Claimant's expert, and Dr. Campbell, Employer's expert, agree that Claimant is totally disabled. Houser Deposition 25-26; E. Ex. 8 (Campbell report). Dr. Selby's contrary opinion, despite a history of three back surgeries and a diagnosis of emphysema and heart disease, is not persuasive. Selby Deposition 12; E. Ex. 4 (Selby report). Thus, the presumption has not been rebutted under section 727.203(b)(2).

IV

According to *Wetherill*, Employer may rebut the interim presumption pursuant to section 727.203(b)(3) by proving that Claimant's pneumoconiosis is not a contributing cause of his disability. Initially, I note two difficulties in Employer's way. First, *Taylor v. Peabody Coal Co.*, 892 F.2d 503 (7th Cir. 1989), which was decided after the Board's

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[2] *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 162 n.5 (3rd Cir. 1986); *Sykes v. Director, OWCP*, 812 F.2d 890 (4th Cir. 1987); *York v. Benefits Review Board*, 819 F.2d 134 (6th Cir. 1987).

remand of this case, renders problematic the very applicability of section 727.203(b)(3). *Taylor* holds this rebuttal method invalid, for being more restrictive than the rebuttal methods set forth at 20 CFR 410.490(c). Second, Employer relies on the opinions of Drs. Selby, Campbell and Lefrak, who opined that Claimant does not have pneumoconiosis and that pneumoconiosis does not contribute to his disability. Since it is now established that Claimant does have pneumoconiosis, Employer is relying on medical opinions based on an erroneous premise. These two considerations, I think, are sufficient to support the conclusion that the interim presumption has not been rebutted.

Moreover, the rebuttal evidence falls short even when measured by the *Wetherill* standard. The record contains five reports of medical examinations which are relevant to this causation issue. In March, 1978, Claimant was examined by Dr. Herbert V. Fine who diagnosed chronic obstructive pulmonary disease in the form of emphysema, related to Claimant's dust exposure in his coal mine employment. Dir. Ex. 16. Dr. Fine stated that Claimant had been under his care for several years, had been evaluated at two hospitals, and had required pulmonary assistance. In January, 1981, Dr. Lefrak, examined Claimant in Employer's behalf. Dr. Lefrak found no evidence of "any form of pneumoconiosis nor any form of pulmonary disability." Dir. Ex. 22. Dr. Lefrak did not comment on the presence or absence of chronic obstructive lung disease, although he knew from Claimant's history that Claimant had been treated for emphysema. Claimant was next examined by Dr. Edward J. Campbell in November 1986, at Employer's request. Dr. Campbell reported eight medical conditions, including chronic bronchitis. E. Ex. 9. Dr. Campbell stated specifically that he found no evidence of pneumoconiosis or disabling respiratory impairment, and that Claimant's

disability was due entirely to angina pectoris and lumbar spine disease.

In 1989, Claimant was examined by Dr. William C. Houser, in his own behalf, and by Dr. Jeffrey W. Selby, in Employer's behalf. Dr. Houser diagnosed pneumoconiosis, and chronic bronchitis which he states is probably related to the synergistic effects of coal mine employment and cigarette smoking. Cl. Ex. 3. On deposition, Dr. Houser testified that Claimant's pneumoconiosis and chronic bronchitis are a contributing factor of his disability. Dr. Selby found mild to moderate emphysema from cigarette smoking alone, but stated that Claimant does not have pneumoconiosis. E. Ex. 4. On deposition, Dr. Selby testified that Claimant is able to return to coal mining work, and that his emphysema is due to cigarette smoking. Dr. Selby noted that Claimant had been less than cooperative in giving a history and in performing a ventilatory study.

Drs. Lefrak, Campbell, Houser, and Shelby are pulmonary specialists; Dr. Fine's qualifications are not disclosed. In order to rebut the presumption of total disability due to pneumoconiosis under section 727.203(b)(3), Employer must prove either that Claimant has no respiratory or pulmonary impairment or that such impairment is not causally related to his coal mine employment. I find that Claimant does have some chronic obstructive pulmonary disease characterized as chronic bronchitis by Drs. Campbell and Houser and emphysema by Drs. Fine and Selby. Although Dr. Fine's opinion is obviously old, it deserves special attention because Dr. Fine treated Claimant for several years, and before Claimant filed his claim for black lung benefits. As to the potential relation of the respiratory disease and 26 years of underground coal mining, I find the negative opinion of Dr. Selby too extreme to in-

spire confidence. I think it more likely that Claimant's respiratory disease is related both to coal dust exposure and cigarette smoking. Finally, based on the opinions of Drs. Fine and Houser, I find that Claimant's respiratory disease causes some impairment which is a contributing factor of his total disability. Thus, section 727.203(b)(3) rebuttal has not been accomplished. See *Borgeson v. Kaiser Steel Corp.*, 12 BLR 1-169, 1-173 (1989).

V

By reason of the foregoing, I conclude that Claimant is entitled to benefits from September 1977, the month in which he filed his claim. The benefit amount must be augmented by reason of Claimant's dependent son, Timothy Foster, born July 13, 1964, during the period of his dependency.

ORDER

Freeman United Coal Mining Company shall:

1. Pay Claimant, William E. Foster, all benefits to which he is entitled, from September 1977;

2. Reimburse the Secretary of Labor for all payments of benefits made under the Act to Claimant since September 1977, and deduct such amount from the amount otherwise payable to Claimant under paragraph 1 above; and

3. Pay Claimant or the Secretary, as appropriate, interest in accordance with 20 CFR 725.608.

/s/ Nicodemo DeGregorio
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 CFR §725.481, any party dissatisfied with this Order may appeal it to the Benefits Review Board within 30 days from the date of this Order by filing a Notice of Appeal with the Benefits Review Board, 1111 20th Street, N.W., Suite 757, Washington, D.C. 20036. *A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2605, 200 Constitution Avenue, N.W., Washington, D.C. 20210.*

RJF/bac